II. EPA'S FAILURE TO CONSULT TO ENSURE ITS PESTICIDE REGISTRATIONS WILL NOT JEOPARDIZE THE SURVIVAL OF LISTED SALMON.

Salmon once thrived in the Pacific Northwest, but their populations have declined dramatically to the point that NMFS has since 1989 listed 26 populations of salmon and steelhead under the ESA. NMFS has identified pesticides as a threat to salmon survival, and has noted that EPA registrations were developed in the absence of information about the full impact of the pesticides on salmon. *See* 65 Fed. Reg. 42,422, 42,457, 42,473 (2000) (salmon protection rule).

Despite the passage of more than a dozen years since the first salmon listing, EPA had initiated no consultations with NMFS on any pesticides when this case was filed in 2001. During this period, EPA made findings in the reregistration process that particular pesticide uses posed threats to fish and their habitat. EPA recognized that these findings triggered its responsibility to assess whether to modify the registrations to protect threatened or endangered species. *See* 54 Fed. Reg. 27,984, 27,992, 28,003 (1989) (EPA conducts a risk assessment to arrive at a "may affect" determination). Nonetheless, for two dozen pesticides commonly used in Washington, Oregon, or California, or frequently detected by the U.S. Geological Survey ("USGS") in salmon watersheds in those states, EPA had reregistered pesticide uses without engaging in any consultation under § 7(a)(2) to ensure that those uses would avoid jeopardy to listed salmon. It has reregistered nearly two dozen more during the pendency of this case. Rather than integrate ESA consultations into its ongoing reregistrations, EPA postponed compliance with the ESA until it developed an

endangered species protection program that was initially proposed in 1989, but never finalized.

III. PROCEEDINGS BELOW

Respondents Washington Toxics Coalition *et al.* ("WTC") brought this case to compel EPA to comply with § 7(a)(2) by consulting on its pesticide registrations that impact threatened and endangered salmon and steelhead ("listed salmon"). WTC introduced evidence that 55 specific pesticides are causing or are likely to cause harm to listed salmon in the form of: (1) EPA's reregistration findings that estimated concentrations likely to migrate into surface water under EPA-authorized uses would exceed EPA's "levels of concern," the levels EPA determined will harm fish or their habitat; and (2) USGS detections of the pesticides in Pacific Northwest and California rivers and streams at levels associated with detrimental impacts to salmon and their habitat.

A. The Summary Judgment Ruling

On July 2, 2002, the district court held that "each pesticide registration constitutes an ongoing agency action for purposes of section 7(a)(2)," App. 133a, and "EPA retains significant ongoing discretionary authority with respect to all pesticide registrations" triggering the duty to consult and avoid jeopardy, App. 134a.

Of particular relevance for this petition, the court rejected EPA and CropLife's contention that the case "do[es] not arise under the ESA's citizen-suit provision." App. 128a. The ESA, not the Administrative Procedure Act ("APA"), governed the case because the ESA citizen suit provision specifically authorizes this action, and because the APA provides judicial review only where "there is no

other adequate remedy in a court." App. 129a (quoting 5 U.S.C. § 704). This holding had several consequences. First, although the court found the APA's final agency action requirement inapplicable, it nonetheless concluded that "EPA's longstanding failure to commence section 7(a)(2) consultation with respect to threatened and endangered salmonids satisfies any possible finality requirement." App. 136a n.19. Second, the court held that judicially crafted standards assessing whether an agency has withheld or unreasonably delayed action in violation of the APA have never been applied in the § 7 context and were inapplicable. App. 143a-144a. Third, where claims fall outside the purview of ESA citizen suits, as is the case for NMFS regulatory actions, the ESA provides no standard for review, and hence the APA standard for review applies. In contrast, "whether an agency has violated mandatory consultation requirements is a straightforward inquiry." App. 130a n.10.

Turning to the merits, the court found that "it is undisputed that EPA has not initiated, let alone completed, consultation with respect to the relevant 55 pesticide active ingredients," App. 144a, and that "EPA's own reports document the potentially-significant risks posed by registered pesticides to threatened and endangered salmonids and their habitat," App. 142a n.25. According to the court:

> Despite competent scientific evidence addressing the effects of pesticides on salmonids and their habitat, EPA has failed to initiate section 7(a)(2) consultation with respect to its pesticide registrations. . . . Such consultation is mandatory and not subject to unbridled agency discretion. The Court declares, as a matter of law, that EPA has violated section 7(a)(2) of the ESA with respect to

> its ongoing approval of 55 pesticide active ingredients and registration of pesticides containing those active ingredients.

App. 142a-143a. The court established a schedule, which ran through December 1, 2004, for EPA to make "may affect" determinations for these pesticides and initiate consultations, as appropriate. App. 145a-146a. EPA has made effects determinations for the 55 pesticides pursuant to that schedule, but no consultations have yet been completed.

B. The Injunction

Because initiation of consultation merely began the process to bring the pesticide registrations into compliance with the ESA, WTC sought further injunctive relief to protect salmon during the consultation process. In support of this motion, WTC submitted findings made by EPA, NMFS and the Fish and Wildlife Service, as well as expert declarations attesting to the pesticides' propensity to enter streams through runoff and spray drift, and to the efficacy of no-spray buffer zones to reduce pesticide concentrations in streams.

Through orders issued on July 16, 2003, August 8, 2003, and January 22, 2004, the district court issued interim injunctive relief. Based on the evidence, and particularly on expert opinions expressed by EPA and NMFS, App. 103a-109a, the court found that "significant, potentially harmful activity is presently ongoing in the face of a substantial unremedied procedural violation of the ESA," App. 109a, and "the relevant agency actions . . . present a significant, potential harm to threatened and endangered salmonids," App. 120a. In light of these findings, the court concluded that "interim injunctive

relief is generally necessary to fulfill the institutionalized caution mandate of the ESA." App. 102a.

The court found WTC had shown "with reasonable scientific certainty, that the requested buffer zones ... will, unlike the status quo, substantially contribute to the prevention of jeopardy." App. 120a-121a. More specifically:

> The evidence submitted – including the declarations of *all* parties' experts, reregistration eligibility decisions, EPA risk assessments, prior EPA consultations with the Fish and Wildlife Service, EPA's reliance on California's county bulletin buffer zones, and an EPA expert's current section 7(a)(2) recommendations – demonstrates that pesticide-application buffer zones are a common, simple, and effective strategy to avoid jeopardy to threatened and endangered salmonids. Plaintiffs' experts sufficiently articulate the general efficacy of buffer zones in preventing the migration of pesticides, via spray drift, surface runoff, or erosion, into salmon-bearing waters. Neither EPA nor CropLife dispute these basic principles.

App. 110a; *see* App. 111a-112a.

On January 22, 2004, the court issued an injunction imposing buffer zones for use of the pesticides along salmon-supporting waters – 20 yards for ground applications and 100 yards for aerial spraying. App. 24a. The court crafted alternative buffers for 25 specific pesticide uses based either on EPA's expert recommendations or evidence that the uses were unlikely to produce runoff, and it excluded from the buffers: (1) pesticide uses for which EPA has made "no effect" or "not likely to adversely affect" determinations; (2) public health vector control programs administered by public entities; (3) noxious weed programs implementing safeguards routinely required by NMFS; (4) programs authorized by NMFS under the ESA.

App. 24a-31a. Upon finding buffers alone insufficient to minimize runoff in the urban environment, the court required urban point-of-sale warnings to alert consumers that use of seven pesticides found frequently by USGS in urban salmon streams may harm listed salmon. App. 32a-33a. The district court has not yet entered final judgment.

C. The Appeal

EPA appealed the injunction, arguing that the court erred by not abiding by statutory constraints on EPA's ability to suspend pesticides when it crafted injunctive relief.[1] Specifically, EPA asserted that WTC should have been required to petition EPA to cancel or suspend the pesticide registrations, and the court should have waited for and deferred to EPA's resolution of such petitions in crafting injunctive relief.

CropLife and a split-off set of intervenors led by the Washington State Farm Bureau also appealed. CropLife challenged not only the injunction but also the underlying summary judgment ruling, arguing that the district court erred in holding the APA inapplicable and in finding an ESA violation.

A unanimous panel of the Ninth Circuit affirmed. App. 7a. At the outset, the panel noted that none of the parties disputed the district court's finding that scientific and competent evidence demonstrated a causal link between the 54 pesticides and adverse effects on salmon populations. App. 7a.

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[1] EPA also challenged certain aspects of the point-of-sale warning requirements, which are not implicated by CropLife's petition.

On the merits, expressly agreeing with the Eighth Circuit in *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989), the court held that "even though EPA registers pesticides under FIFRA, it must also comply with the ESA when threatened or endangered species are affected." App. 12a; *id.* ("compliance with FIFRA requirements does not overcome an agency's obligation to comply with" the ESA.). Because EPA has continuing authority over pesticide registrations and ongoing discretion to alter the registrations to protect listed species, the court held that "EPA's regulatory discretion is not limited by FIFRA in any way that would bar an injunction to enforce the ESA." App. 14a. The appellate court also rejected EPA's exhaustion argument: "Neither FIFRA nor the ESA, however, suggest any legislative intent to require exhaustion of the FIFRA remedy before seeking relief under the ESA." App. 15a; *id.* ("the mere fact that FIFRA recognizes EPA authority to suspend registered pesticides to protect listed species does not mean that FIFRA remedies trump those Congress expressly made available under ESA, or that FIFRA provides an exclusive or primary remedy.").

Next the court found the APA's judicial review provisions inapplicable because they apply only where there is no other adequate remedy in court and "the ESA citizen suit provision creates an express, adequate remedy." App. 16a.

Finally, the court turned back the "scatter[ed]" challenges to the scope of the injunction. App. 16a. Where an agency has violated its statutory ESA consultation duties, the court held an injunction pending ESA compliance is an appropriate remedy. App. 18a; App. 16a-17a ("It is well-settled that a court can enjoin agency action pending completion of section 7(a)(2) requirements."). Because § 7(a)(2) consultation embodies the ESA's "institutionalized caution

mandate[]" to ensure agency actions will not jeopardize an endangered species's survival, and in light of the evidence of the pesticides' harmful effects, the district court "correctly assigned EPA the burden of proving that its actions were non-jeopardizing" before they could go forward. App. 18a (citation omitted). Finally, the district court was not required to balance endangered species protection against the costs of the injunction to private interests because "Congress has decided that, under the ESA, the balance of hardships always tips sharply in favor of the endangered or threatened species." App. 18a.

REASONS FOR DENYING THE WRIT

The courts below rejected the invitation made by CropLife, and initially by EPA, to dismiss this case because it had to be brought under the APA, heeding the plain language of the ESA and APA, as well as this Court's precedent. Recognizing that this holding is neither novel nor controversial, CropLife now seeks to import wholesale into ESA citizen suits what it calls the APA's "standards and methods," a phrase used throughout the petition but never clearly defined. The Ninth Circuit did not rule on this convoluted end-run around the ESA's authorization of citizen suits to enforce ESA requirements. Accordingly, CropLife can point to no holding for this Court to review.

Moreover, despite CropLife's emphatic assertion, the district court did not conduct *de novo* review. It held no evidentiary hearing. Nor did it make its own determinations as to whether particular pesticides are likely to adversely affect listed salmon. Instead, it ordered EPA to make such determinations, which EPA has now done. Nor did the district court order EPA to initiate ESA formal consultation before it found a pesticide likely to adversely

affect listed salmonids. In any event, this claim is moot because EPA has now made "may affect" determinations, and the injunction applies only to pesticides that EPA has determined are likely to adversely affect listed salmon.

CropLife can point to no precedent in this Court or any court of appeals holding that an agency's statutory authorization to take a particular action operates as a constraint on the court's equitable power to remedy that same agency's violation of other statutory duties. CropLife argues that the district court had to wait for EPA to decide whether to suspend each of the 55 pesticide registrations under FIFRA, and that any injunctive relief had to coincide with the outcome of that time-consuming process. The court of appeals appropriately held that the court's equitable power is not confined in this manner.

I. THE COURT OF APPEALS'S APA HOLDING DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR THE COURTS OF APPEALS.

The first question presented vaguely asserts that the APA's "standards and methods" apply to ESA citizen suits. Petition at i, 2. The phrase "standards and methods" appears nowhere in the ESA or the APA, and it is not a term of art. Although the bulk of the petition focuses on the APA's standard of review, the petition also advocates for importing wholesale other APA limits on judicial review into ESA citizen suits. And although no longer presented as a jurisdictional argument that WTC had to bring this case under the APA, not the ESA, the newly crafted argument would lead to the same result.

A. The Court's Holding That This Case Arises Under the ESA, Not the APA, Is in Accord With the Governing Statutes and This Court's Precedent.

The courts below held that this case arises under the ESA citizen suit provision. That holding flows directly from the plain language in the ESA and APA, as well as this Court's precedent.

The APA provides an avenue for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. By its plain terms, APA review is unavailable if it would duplicate established statutory procedures authorizing judicial review of agency actions. *See Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). The ESA is such a statute. It authorizes citizen suits "to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter or any regulation issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A).

This Court held unanimously in *Bennett v. Spear*, 520 U.S. 154, 173-74 (1997), that the expert wildlife agencies – NMFS and Fish and Wildlife Service – cannot be sued under the ESA for "failure to perform [their] duties as administrator of the ESA." Claims alleging the Services' "maladministration of the ESA" must be brought under the APA. *Id.* at 177-78. In contrast, "§ 1540(g)(1)(A) is a means by which private parties may enforce the substantive provisions of the ESA against regulated parties," including federal action agencies. *Bennett*, 520 U.S. at 173-74. In contrasting APA review with ESA citizen suits, the Court noted that APA review is limited to "final agency action," while the ESA citizen suit provision contains no comparable

limitation. *Id.* at 174 (extending ESA citizen suits to maladministration claims would "effect a wholesale abrogation of the APA's 'final agency action' requirement.").

CropLife misreads *Bennett* in arguing that lawsuits seeking to compel EPA to comply with the ESA must be brought under the APA. Petition at 19. CropLife tries to characterize EPA as an administrator of the ESA, because EPA must initiate § 7(a)(2) consultations. CropLife's argument would convert any federal agency, whether the Federal Highway Administration or Army Corps of Engineers, into an ESA "administrator" outside the reach of ESA citizen suits. *Bennett* supports no such line-drawing among various tasks performed by action agencies, like EPA. Instead, it distinguished the expert fish and wildlife agencies administering the ESA from the agencies pursuing actions that may harm endangered species (called "action agencies"), which are constrained and regulated by the Act. This position is also flatly at odds with the language of the ESA citizen suit provision, which extends to any person's (including action agencies') violations of the ESA, whether procedural or substantive, but not to the regulators' administration of the Act.[2]

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[2] CropLife tries to draw support for its view that EPA co-administers the ESA from the plurality opinion on Article III redressability in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-71 (1992), without noting that five Justices explicitly refused to join in the cited portion of the opinion. Moreover, even the plurality qualified its statements about the consulting agency's role in initiating consultations by contrasting the positions taken by the government as to the binding nature of the consultation regulations, calling it an open question, and inserting the word "arguably" before the language quoted in CropLife's petition. *Id.* at 568. Nothing in *Lujan* suggests that action agencies have unfettered discretion to avoid consultation under § 7(a)(2) or that their failure to consult is outside the reach of an ESA citizen suit.

The core APA issue decided below is whether this case arose under the ESA citizen suit or the APA. Because the ESA citizen suit "independently authorizes a private right of action" to compel action agencies to comply with the ESA, the court of appeals properly held that this case "arise[s] under the ESA citizen suit provision, and not the APA." App. 16a; *see also* 129a-130a. The lower courts' resolution of that issue constitutes a straightforward reading of the statutes and renders this case unworthy of review.

B. The APA Standard of Review Issue Pressed by CropLife Was Peripheral to the Proceedings Below and Poses No Conflict With This Court's Precedent or Other Circuits' Decisions.

The court below disposed of CropLife's APA argument in one paragraph, holding that an action to compel agency compliance with § 7(a)(2) arises under the ESA citizen suit provision. Recognizing that this holding is of little moment and poses no conflict with other Circuits, CropLife tries to manufacture a split among the Circuits based on a peripheral issue that the courts below never explicitly addressed. CropLife contends that the court of appeals erred by not deciding that the APA standard of review governs ESA citizen suits. The court of appeals never reached this issue. Moreover, applying the APA's standard of review or even other APA "standards and methods" mentioned in CropLife's petition would have led to the same result.

1. The Decision Below Is Consistent With the Only Other Court of Appeals Decision on Point.

CropLife tries to paint a picture of a conflict among the Circuits on the applicability of the APA's standard of review to a case seeking to compel an action agency to comply with the ESA. Yet it never cites the only other court of appeals decision addressing the interrelation between the ESA, FIFRA, and the APA.

In *Defenders of Wildlife v. EPA*, 882 F.2d 1294 (8th Cir. 1989), the plaintiffs sued EPA for violating the ESA with respect to a pesticide registration for strychnine. The Eighth Circuit held that the ESA citizen suit provision permits the plaintiffs "to sue the EPA in an effort to enjoin any asserted violations of the ESA." *Id.* at 1300. Although FIFRA provides the exclusive means for EPA to cancel a pesticide registration, the court held that exhaustion of FIFRA remedies was not a prerequisite to bringing a citizen suit under the ESA. *Id.* at 1299-1300. In contrast, the plaintiffs could not challenge EPA's alleged violations of other statutes that lacked a private right of action without exhausting administrative remedies afforded under FIFRA. *Id.* at 1302-03.

The Eighth and Ninth Circuits agree that ESA citizen suits are the mechanism for challenging EPA's failure to comply with the ESA in registering pesticides. No other court of appeals has addressed the issue, let alone reached a conflicting result.

2. No Other Courts of Appeals' Decisions Are on Point.

The petition posits a conflict between the decision below and "uniform decisions" of the courts of appeals.

Petition at 11. None of the cases that petitioners cite holds that claims seeking to compel action agencies to comply with the ESA must be brought under the APA.[3] Recognizing that there is no conflict between the holding below and any of the cited cases, CropLife strings together a series of disparate decisions on a peripheral issue – whether the lower courts should have applied the APA standard of review for challenges to agency actions. These cases, however, present different causes of action and holdings that have little resemblance or relevance to this case.

Some of the cited cases challenged the Services' alleged maladministration rather than the conduct of an action agency. Therefore, under *Bennett*, they were properly brought under the APA. For example, in *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 12-14 (D.C. Cir. 2005), the D.C. Circuit affirmed dismissal of an APA challenge to a Fish and Wildlife Service protocol for detecting an endangered species of butterfly because it did not satisfy the APA's final agency action requirement. Similarly, in *Earth Island Inst. v. Albright*, 147 F.3d 1352, 1357-58 (Fed. Cir. 1998), the Federal Circuit held that the APA governed a challenge to Department of Commerce regulations implementing a law requiring an embargo on shrimp caught using fishing technology that adversely affected sea turtles. Since these cases properly arose under the APA, it is unsurprising that the courts applied the APA standard of review.

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[3] CropLife's citation of § 559 of the APA, 5 U.S.C. § 559, adds nothing to this argument. None of the cases with which the court of appeals's decision is supposed to conflict even cite this provision. Indeed, petitioners can point to no case in which a court has held that an ESA citizen suit must proceed under APA procedures because the ESA does not "expressly supersede" the APA.

Other cases contain only passing references to issues related to CropLife's APA pre-eminence theory. For example, in *Water Keeper Alliance v. U.S. Dep't of Defense*, 271 F.3d 21, 31 (1st Cir. 2001), a case involving review of a preliminary injunction, the First Circuit expressly did not resolve the appropriate standard of review in an ESA citizen suit because Water Keeper had shown no probability of success under the most favorable standard. In *Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 372, 373-74 (5th Cir. 1976), although the Fifth Circuit made a cryptic reference to principles governing judicial review of agency action, it held that ESA § 7(a)(2) obligates an agency not only to consider project impacts, but also to take all necessary steps to ensure its action will not jeopardize endangered species' continued existence. And in *Gordon v. Norton*, 322 F.3d 1213 (10th Cir. 2003), the Tenth Circuit affirmed dismissal of a challenge to the Fish and Wildlife Service's response to depredations by reintroduced wolves as not ripe because the action was not final and on several other independent grounds without ever addressing what standard of review it would have applied had the case proceeded. *See also Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 765 (8th Cir. 2004) (dismissing ESA claim as moot since violation had been cured).

Most of the cases cited in the petition involved ESA citizen suits challenging agency actions, rather than an agency's failure to take action required by the ESA. In these cases, the courts generally recited accepted administrative review principles, without ruling on any point of controversy or producing any holding that either had a discernible effect on the outcome or that could give rise to a reviewable conflict. *See id.* (affirming dismissal of ESA challenge to a regulation on ground that National Park Service did not rely solely on a draft study as alleged but on numerous studies); *Sierra Club v. U.S. Army Corps of Engineers*, 295 F.3d 1209,

1216 (11th Cir. 2002) (holding that the Corps complied with ESA obligations in assessing impacts of road and that additional mitigation created no obligation to prepare a new biological assessment); *Sierra Club v. Froehlke*, 534 F.2d 1289, 1304-05 (8th Cir. 1976) (affirming district court's determination that Corps satisfied its ESA §§ 7 and 9 duties in proceeding with a dam). CropLife cites a footnote in *Hill v. Tenn. Valley Auth.*, 549 F.2d 1064, 1074 n.21 (6th Cir. 1977), which indicates that the court found that TVA's "decision to complete the Tellico Dam at the expense of the snail darter is 'not in accordance with law.'" Without suggesting in any way that the APA should govern judicial review, this Court upheld the Sixth Circuit based on the mandatory, uncompromising mandates embodied in § 7(a)(2). *TVA*, 437 U.S. at 183-86.

In only two of the cited cases did the courts of appeals hold that the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard of review applied to an ESA challenge, and both cases involved challenges to agency actions, rather than suits to compel agencies to take ESA-mandated actions. In *Sierra Club v. Glickman*, 67 F.3d 90, 93, 95 (5th Cir. 1995), the Fifth Circuit found fault in the district court's *de novo* review (in the form of a four-day trial) of whether the Forest Service's logging guidelines complied with the ESA. In reaching this result, the court emphasized that the APA prescribes a standard for reviewing agency *actions*, quoting 5 U.S.C. § 706(2). 67 F.3d at 96. Similarly, in *Cabinet Mts. Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 684-85 (D.C. Cir. 1982), the D.C. Circuit rejected the contention that the ESA requires *de novo* adjudications in which the district court substitutes its view of the environmental impacts for those of the agency. Because the ESA does not prescribe a standard of review, the court looked to the APA. While the

APA provides for *de novo* review of certain adjudicatory proceedings, its arbitrary, capricious or not in accordance with law standard governs review of agency action. *Id.* at 685-86.

The holdings in these two cases have no bearing on this case for two reasons. First, both sought review of agency action, rather than to compel an agency to discharge its statutory duties. The courts borrowed the APA standard of review for such actions because the ESA citizen suit specified no standard of its own. In contrast to its express standard of review for challenges to agency actions, 5 U.S.C. § 706(2), the APA is no more explicit than the ESA in setting out a standard of review for an agency's failure to act. The APA authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), and the ESA authorizes courts to enjoin any agency that is "in violation of any provision" of the ESA or its implementing regulations. 16 U.S.C. § 1540(g)(1)(A). Although courts have developed judge-made standards for determining when an agency has unreasonably delayed agency action, it is the underlying statute that dictates when an agency has unlawfully withheld agency actions. So, too, it is the underlying ESA mandate that creates the duty that gives rise to an ESA citizen suit claim. The courts below appropriately looked to the ESA's mandates to determine whether EPA had breached its duties under § 7(a)(2).

Second, despite CropLife's protestations to the contrary, the district court did not conduct *de novo* review. The district court never held a trial. Nor did it make its own findings regarding whether particular pesticides warranted formal consultation. Rather, it relied on the findings EPA had made during reregistration decisions that particular pesticides are likely to migrate into water at levels that harm fish. For the

55 pesticides in the case, the court found that "EPA's own reports document the potentially-significant risks posed by registered pesticides to threatened and endangered salmonids and their habitat." App. 142a n.25. Even then, rather than direct EPA to enter into formal consultations for all 55 pesticides, the court ordered EPA to make "may affect" determinations and consult, as appropriate, on each of the pesticides. App. 145a-146a. Moreover, when CropLife and EPA asked the Court to hold a full-blown evidentiary hearing and make its own findings regarding the harm the pesticides would cause to salmon, the court refused:

> It is the responsibility of neither plaintiffs nor the Court to determine the precise effects of EPA-registered pesticide active ingredients on threatened and endangered salmonids. Rather, EPA and NMFS shall make these determinations via the fact-intensive inquiry of the section 7(a)(2) consultation process. Only this process itself can determine the long-term measures necessary to prevent jeopardy, adverse impacts, or irreparable harm to threatened and endangered salmonids.

App. 113a-114a (citations omitted).

In sum, the holding below does not conflict with the decisions of any other circuit. At most, CropLife has identified *dicta* in two cases that are at odds with rulings it wishes the courts had made, but did not make, in this case. This case therefore does not present a square conflict appropriate for certiorari review. *See Bunting v. Mellen*, 124 S. Ct. 1750, 1754 (2004) (Scalia, J., dissenting from denial of certiorari) ("We sit, after all, not to correct errors in dicta. . . .").

C. CropLife Has No Basis for Asserting That the Outcome Would Have Been Different Had the Courts Adhered Strictly to APA Standards.

CropLife boldly asserts that the outcome below would have been different had the courts strictly adhered to APA standards for reviewing agency action. This assertion is not borne out by the record.

First, as discussed above, the district court deferred to EPA both in ruling on the merits and in crafting the injunction. The court predicated its standing and merits rulings on EPA's findings that the 55 pesticides would likely harm fish.[4] Moreover, the court refrained from making its own determinations as to the effects of particular pesticides on listed salmon and instead ordered EPA to make effects determinations for 55 pesticides and to initiate consultations, where appropriate, based on EPA's determinations. In addition, where EPA recommended specific buffers in its effects determinations, the court incorporated those buffers into its injunction.

Second, the ESA makes NMFS and the Fish and Wildlife Service the expert agencies charged with determining through the consultation process whether federal actions will jeopardize endangered species' survival and crafting mitigation strategies to avoid that outcome. 16 U.S.C. § 1536(a)-(b). If deference should be accorded, NMFS, not EPA, would be the recipient of that deference. *See, e.g., Nat'l Wildlife Fed'n*, 529 F.2d at 375 (deferring to Fish and Wildlife Service regarding mitigation needed to avoid jeopardy).

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[4] Contrary to CropLife's suggestion (at 20 n.8), the district court placed the burden on plaintiffs to prove that EPA had violated its § 7(a)(2) obligations. App. 139a-140a, 142a-143a.

Third, CropLife has made no showing that the APA's other "standards and methods" would produce a different result. For example, even if, contrary to *Bennett*, 520 U.S. at 174, the APA's "final agency action" requirement applied to an ESA citizen suit, the district court found that "EPA's long-standing failure to commence section 7(a)(2) consultation with respect to threatened and endangered salmonids satisfies any possible finality requirement." App. 136a n.19; *see Sierra Club v. Glickman*, 156 F.3d 606, 618 n.7 (5th Cir. 1998) ("Clearly the passage of over 25 years without any action whatsoever with respect to any endangered or threatened species qualifies as 'final agency action.'"). Similarly, even if the courts had applied APA unreasonable delay case law, the result would have been the same, given EPA's 12-year delay in initiating any consultations on pesticides that adversely affect salmon, and its subsequent "may affect" determinations made pursuant to the district court's order. *See, e.g., In re Am. Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004) (six-year delay in responding to petition seeking consultation "is nothing less then egregious" given ESA's species-protection mandates). Likewise, although CropLife insists that review should have been based on an administrative record, even under the APA, unreasonable delay cases often proceed without an administrative record because agencies rarely generate a record when they have been recalcitrant in carrying out their obligations. *See, e.g., Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (In failure to act case, "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record."). In any event, the district court had an ample record on which to resolve this case. WTC introduced EPA's own findings that the authorized uses of the pesticides at issue may harm fish, as well as USGS detections of many of the pesticides in

salmon streams, which substantiated the adverse impacts on salmon. CropLife never identified additional agency documents that should have been, but were not, before the district court, despite having nearly a year to do so during the summary judgment proceedings.[5]

Fourth, CropLife's plea for deference is wholly inapplicable to the judicial crafting of a remedy for EPA's violations of the law. Such a plea for deference essentially asks the courts to allow an agency that has violated the law to determine the remedy for its own wrongdoing. It is the province of the courts, not the offending agency, to determine the scope of the remedy. *See, e.g., United States v. Rohm & Haas Co.*, 500 F.2d 167, 175 (5th Cir. 1974) (refusing to defer to EPA in crafting remedy for EPA's legal violations because "[t]he moulding of equitable relief, even in highly technical matters, is the proper concern of the courts."). Moreover, it is well settled that injunctive relief may be based on evidence beyond what was presented to and considered by the agency. *See, e.g., Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1259-61 (10th Cir. 2003) (extra-record evidence allowed at injunctive stage in record review case); *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (same).[6]

In any event, the district court did defer to EPA in setting the timetable for correcting its ESA violations by

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[5] The district court found CropLife's arguments that specific pesticide uses would not harm salmonids belied by EPA's risk assessments and by NMFS and the Fish and Wildlife Service's critiques of those risk assessments. App. 105a-109a.

[6] To the extent CropLife claims that injunctive relief should be determined based on an administrative record, the district court properly observed that it is the "consultation process that serves to generate this scientific record" and "the absence of any record is a result of EPA's own failure to initiate timely consultation with NMFS." App. 91a n.4.

adopting, for the most part, the schedule EPA had proposed for making effects determinations and initiating ESA consultations. In addition, in establishing the buffer zones, the court relied on prior NMFS and Fish and Wildlife Service findings that buffers afford effective mitigation, and it selected the smallest buffers routinely embodied in past Fish and Wildlife Service biological opinions to mitigate harm to species other than salmon from pesticides. App. 110a-111a. Even though neither EPA nor NMFS proposed interim protections, despite the court's repeated invitations to do so, App. 114a-115a, 121a-122a, the court adopted any buffer zones recommended by EPA experts in effects determinations, App. 25a-30a, 104a-105a n.20; 114a-115a, and the court deferred to NMFS's authorization of particular pesticide uses under the ESA. App. 30a-31a. Moreover, the injunction leaves the integrity of the FIFRA registration scheme intact since it imposes interim protections only during the time it takes to complete ESA consultations. Once the consultations are completed, EPA can exercise its authority to modify or cancel FIFRA registrations as needed to guard against jeopardy and mitigate harm to salmon.

In sum, the first question presented does not warrant this Court's review. The holding below is fully consistent with the governing statutes, this Court's precedent, and all relevant circuit authority. Moreover, the ruling CropLife seeks would produce no different outcome.

II. THE SECOND QUESTION PRESENTED IS MOOT.

CropLife's question presented 2(a) asks whether the district court erred in holding that EPA violated § 7(a)(2) when the implementing regulations require consultation only for actions that "may affect" listed species. *See* 50 C.F.R.

§ 402.14(a). As this Court explained in *TVA*, 437 U.S. at 183-85, § 7(a)(2) imposes mandatory obligations on federal agencies that they have no discretion to override. And as the district court stated, and even CropLife concedes, EPA's duty to consult on pesticide registrations that "may affect" listed salmon "is mandatory and not subject to unbridled agency discretion." App. 143a.

CropLife seems to contend that EPA had unbridled discretion to decide when, if ever, to make effects determinations for the pesticides, based on a misleading description of a statement on a tangentially related issue in the plurality opinion in *Lujan*, 504 U.S. at 568-69. *See supra* at 14 n.2. Not only is there no legal basis for CropLife's approach, but it would allow agencies to spurn their § 7(a)(2) obligations, leaving endangered species at risk for inordinate periods of time.

In any event, any such claim is now moot. EPA has made "may affect" determinations for all 55 pesticides. It, therefore, has made the determinations that CropLife concedes trigger the duty to consult. Moreover, the district court tailored injunctive relief to coincide with EPA's effects determinations. Accordingly, the injunction applies only to those pesticide uses that EPA has found "may affect" and are "likely to adversely affect" listed salmon. App. 24a-25a, 34a. In light of its mootness, this question is inappropriate for review.

III. THE COURT OF APPEALS PROPERLY HELD THAT A DISTRICT COURT MAY ISSUE AN INJUNCTION TO REMEDY AN ESA VIOLATION REGARDLESS OF STATUTORY CONSTRAINTS ON THE OFFENDING AGENCY'S AUTHORITY TO TAKE OTHER ACTIONS UNDER OTHER STATUTES.

CropLife's question presented 2(b) asserts that the district court had no equitable power to fashion an injunction to protect endangered species while EPA corrects its ESA violations, but instead had to wait for EPA to suspend the pesticide registrations under FIFRA. In other words, CropLife believes the district court could issue an injunction to remedy an ESA violation only if FIFRA standards were independently violated. If accepted, FIFRA standards and processes for suspending pesticide registrations would trump both the ESA and a court's equitable power. This issue does not warrant this Court's review for four reasons.

First, CropLife's position collides with two well-settled propositions: (1) that the courts have broad equitable power to craft injunctions to remedy violations of the law; and (2) that when Congress creates a right of action, courts have available to them "all appropriate remedies unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66 (1992). In *TVA*, 437 U.S. at 194, this Court held that:

> Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as "institutionalized caution."

In reaching this conclusion, *TVA* explicitly rejected the notion that Congress made ESA remedies subservient to

the agency's primary authorizing statute. Because the ESA eliminated agency discretion to avoid protecting endangered species by invoking their primary objectives, *TVA* concluded: "The pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." 437 U.S. at 185; *see id.* at 175, 181-83 (same).[7]

Second, as with CropLife's first question, the two courts of appeals to reach the issue are in accord in rejecting this plea for exclusive FIFRA remedies for ESA violations. In this case, the Ninth Circuit rejected the contention that "EPA's regulation of a pesticide under FIFRA bars a suit under the ESA asserting that the continued use of the pesticide violates the ESA," App. 11a, and held that "EPA's regulatory discretion is not limited in FIFRA in any way that would bar an injunction to enforce the ESA." App. 14a. Similarly, in *Defenders of Wildlife*, 882 F.2d at 1300, the Eighth Circuit explicitly rejected the contention that the FIFRA scheme made it improper for the district court to enjoin EPA from authorizing certain strychnine uses until it complied with the ESA.

Third, as the district court observed, the parties cited "absolutely no case arising under the ESA in which a court required plaintiffs to initiate a collateral administrative

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[7] To the extent CropLife is asserting that the district court erred by not heeding the balance struck in FIFRA, *TVA*, 437 U.S. at 184, held that ESA strikes the balance in favor of protecting endangered species: "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (ESA "foreclosed the exercise of the usual discretion possessed by a court of equity."); *accord Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 543 n.9 (1987) (same).

proceeding to seek injunctive relief after concluding that the agency had substantially abrogated mandatory section 7(a)(2) obligations." App. 92a. The only case cited in the petition for this novel proposition is *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). However, in *Middlesex*, this Court refused to imply a private right of action for damages because the Clean Water Act authorized particular remedies – injunctions and civil penalties – through its citizen suit provision. Here, the ESA specifically authorizes citizen suits to "enjoin any person . . . in violation of" the ESA, "to enforce" the ESA, and to afford "any other relief." 16 U.S.C. § 1540(g)(1), (5). Nothing in *Middlesex* supports CropLife's assertion that FIFRA establishes the exclusive remedy for EPA's violations of the ESA.

Finally, FIFRA's imminent hazard provision, 7 U.S.C. § 136d(c), was never intended to govern relief in ESA cases. Since long before enactment of the ESA, this provision has governed *EPA's* authority to suspend a pesticide registration during a cancellation proceeding. It has never been read to constrain a *court's* equitable power to remedy an ESA violation.[8] Moreover, FIFRA's imminent hazard provision is but one FIFRA mechanism for protecting endangered species from pesticide impacts. In *Defenders of Wildlife*, 882 F.2d at 1299, the Eighth Circuit observed that EPA has authority to conform its FIFRA registrations to meet ESA standards: "a pesticide registration that runs against the clear mandates of the ESA will most likely cause an unreasonable adverse

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[8] FIFRA contained essentially the same imminent hazard authority prior to enactment of the ESA. The ESA "conforming amendments" did no more than substitute references to the ESA for the predecessor law, including FIFRA's description of harm to imperiled species that could warrant suspension of a pesticide registration. Pub. L. No. 93-205, § 13(f), 87 Stat. 903 (1973).

effect on the environment under FIFRA." Based on this authority, the court of appeals properly held that "EPA's regulatory discretion is not limited by FIFRA in any way that would bar an injunction to enforce the ESA." App. 14a.[9]

This holding makes eminent sense and is fully in accord with *TVA* and this Court's precedent preserving the courts' equitable powers unless a statute expressly overrides them. The only two courts of appeals to reach the issue have refused to make compliance with FIFRA administrative remedies a prerequisite to an injunction remedying an ESA violation. This Court should avoid treading into this theoretical thicket when no lower court has adopted the view that FIFRA trumps ESA remedies.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[9] The time-limited statutory direction for EPA to conduct a study on ESA protections that allow continued agricultural production was satisfied when EPA provided such a report to Congress in 1991 and has no ongoing effect. Pub. L. No. 478, § 1010, 102 Stat. 2313 (1988), 7 U.S.C. § 136a note. That narrow legal requirement in no way modified the mandates of § 7(a)(2).

No. 05-395

In the Supreme Court of the United States

CROPLIFE AMERICA, ET AL., PETITIONERS

v.

WASHINGTON TOXICS COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a suit against a federal agency brought under the citizen-suit provision of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1540(g)(1), a court should apply the same principles of administrative-record review and deference to agency judgments that would be applicable in a suit brought under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

2. Whether Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), requires in all instances that a federal agency must engage in consultation regarding the effect on endangered and threatened species of actions that the agency has determined will have no effect on those species.

3. Whether, in applying Section 7(a)(2) of the ESA to pesticide registrations issued by the Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, a court should take into account the statutory limitations that FIFRA places on EPA's authority to suspend or modify such registrations.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 413 F.3d 1024. The opinions of the district court (Pet. App. 20a-87a, 88a-117a, 118a-123a, 124a-150a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2005. The petition for a writ of certiorari was filed on September 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, to protect and conserve endangered and threatened species. 16 U.S.C.

1531(b). To accomplish that goal, Congress directed the Secretaries of Commerce and the Interior to list threatened and endangered species and designate their critical habitats. See 16 U.S.C. 1533. The Secretary of Commerce, who implements the ESA through the National Marine Fisheries Service (NMFS), has responsibility for the listed species at issue in this case. See 50 C.F.R. 222.23(a), 227.4. The Fish and Wildlife Service (FWS) administers the Act with respect to the species under the jurisdiction of the Secretary of the Interior. See 50 C.F.R. 17.11, 402.01(b).

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Regulations promulgated jointly by the two Secretaries furnish a structure for consultation. See 50 C.F.R. Pt. 402; see also 16 U.S.C. 1536(b)-(c). Under the regulations, the agency proposing the action (commonly known as the action agency) determines in the first instance whether a proposed action "may affect" a listed species. 50 C.F.R. 402.14.

If the action agency determines that a particular action will have no effect on a listed species or critical habitat, the consultation requirements are not triggered. 50 C.F.R. 402.14(a). If the action agency determines that its action "may affect" listed species, it must pursue either informal or formal consultation with NMFS or FWS (commonly known as the resource agency). Informal consultation is an optional process comprised of all discussions and correspondence between the resource

agency and the action agency intended to determine whether formal consultation is necessary. 50 C.F.R. 402.13. If the action agency determines, with the written concurrence of the resource agency, that the action "is not likely to adversely affect" the listed species or critical habitat, the consultation process is terminated, and formal consultation is not necessary. *Ibid.*; 50 C.F.R. 402.14(b)(1).

If either the action agency or the resource agency determines that the proposed action is "likely to adversely affect" listed species or designated critical habitat, the agencies must engage in formal consultation. 50 C.F.R. 402.13(a), 402.14(a)-(b). Following formal consultation, FWS or NMFS issues a biological opinion stating whether the proposed action is likely to jeopardize the continued existence of the listed species. 16 U.S.C. 1536(b); 50 C.F.R. 402.14. If FWS or NMFS concludes that jeopardy is likely, it must suggest any reasonable and prudent alternatives that it believes would avoid jeopardy. 16 U.S.C. 1536(b)(3)(A).

The regulations governing the consultation process define the term "action" to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. 402.02. "Examples include * * * the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." *Ibid.* The regulations further provide that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control." 50 C.F.R. 402.03.

The ESA contains a citizen-suit provision allowing "any person" to sue to "enjoin any person, including the United States * * * , who is alleged to be in violation of

any provision of this chapter or regulation issued under the authority thereof." 16 U.S.C. 1540(g)(1). The district court in such a suit has authority "to enforce any such provision or regulation." *Ibid.*

b. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 *et seq.*, establishes a comprehensive regulatory scheme governing the use, sale, and labeling of pesticides. *Bates* v. *Dow Agrosciences LLC.*, 125 S. Ct. 1788, 1794-1795 (2005). The statute requires the Environmental Protection Agency (EPA) to evaluate individual pesticide products intended for distribution or sale in the United States and to register those that meet FIFRA's requirements. In conducting its evaluation, EPA must determine, *inter alia*, whether a pesticide will cause "unreasonable adverse effects on the environment" when used to perform its intended function. 7 U.S.C. 136a; see 7 U.S.C. 136(bb) (defining the term "unreasonable adverse effects on the environment"). FIFRA makes it unlawful for any person to distribute or sell a pesticide that is not registered or to use any registered pesticide in a manner inconsistent with its labeling. 7 U.S.C. 136a(a), 136j(a). Thus, each registration granted by EPA under FIFRA is a license that establishes the terms and conditions under which the pesticide product may be lawfully sold, distributed, and used.

Section 6(b)-(c) of FIFRA provides for the cancellation and suspension of existing pesticide registrations. 7 U.S.C. 136d(b)-(c). If a pesticide does not comply with FIFRA or, when used in accord with widespread practices, "generally causes unreasonable adverse effects on the environment," EPA may issue a notice of its intent to cancel the registration. 7 U.S.C. 136d(b). In addition, EPA may immediately suspend the registration of a pes-

ticide if it presents an "imminent hazard," which "exists when the continued use of a pesticide during the time required for cancellation proceeding[s] would be likely to result in unreasonable adverse effects on the environment or will involve unreasonable hazard to the survival of a species declared endangered or threatened" under the ESA. 7 U.S.C. 136(*l*), 136d(c)(1). Final EPA decisions on cancellation and suspension of pesticide registrations, including refusals to cancel or suspend registrations, are subject to judicial review. 7 U.S.C. 136n(a)-(b).

2. FIFRA's pesticide-registration requirements have been in effect since 1947, Pub. L. No. 80-104, § 4, 61 Stat. 167, and have been enforced by EPA since 1970, Reorg. Plan No. 3 of 1970, § 2, 3 C.F.R. 199 (1970 comp.). More than 900 pesticide active ingredients, in various combinations, are currently contained in approximately 19,000 pesticide products that EPA has registered under FIFRA for use throughout the country. CropLife C.A. E.R. 44. As required by FIFRA, EPA uses a rigorous scientific process to determine whether to register pesticide products. *Id.* at 36-40, 112-114.

Beginning in 1989, NMFS listed 26 evolutionarily significant units (ESUs) of Pacific Northwest salmonids (*i.e.*, salmon and steelhead) under the ESA. CropLife C.A. E.R. 68, 323 n.1. The dominant causes for the decline of wild salmonids have been habitat alteration, hydropower and dam operations, competition with hatchery-bred fish, harvest, and cyclical ocean conditions. *Id.* at 130-140; see, *e.g.*, 65 Fed. Reg. 36,082-36,083 (2000); 64 Fed. Reg. 50,396-50,397 (1999); 64 Fed. Reg. 14,310-14,311 (1999). Pesticides have not been identified as one of the dominant causes for the decline. CropLife C.A. E.R. 140-141.

3. In January 2001, respondent Washington Toxics Coalition and other groups (collectively the Coalition) filed a citizen suit against EPA and its Administrator. CropLife C.A. E.R. 1-18. The Coalition alleged that EPA had violated Section 7(a)(2) of the ESA by failing to consult with NMFS regarding the effects of pesticide registrations on 26 ESUs of endangered and threatened Pacific salmonids. *Id.* at 10-12, 15-16. The primary pesticide manufacturers' trade group and numerous grower groups (some of which are petitioners in this Court) intervened as defendants, and both sides moved for summary judgment. Pet. App. 6a-7a.

In July 2002, the district court issued an order granting summary judgment to the Coalition in part and to the defendants in part. Pet. App. 124a-150a. Among its numerous threshold rulings, the court held that the suit was properly brought under the ESA's citizen-suit provision rather than under FIFRA or the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 128a-129a. The district court further held that the Coalition had established standing to sue with respect to 54 pesticide ingredients. See *id.* at 137a-143a.[1]

On the merits, the court held that EPA had "violated Section 7(a)(2) of the ESA with respect to its ongoing approval of [54] pesticide active ingredients and registration of pesticides containing those active ingredients." Pet. App. 143a. The court based that conclusion on its finding that, "[d]espite competent scientific evi-

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[1] The district court's July 2002 opinion stated that the Coalition had established standing with respect to "55" pesticide ingredients. See Pet. App. 137a. The court subsequently recognized, however, that it had double-counted one such ingredient. Later opinions of the district court refer to "54" pesticide ingredients as being at issue in this case. See, *e.g. id.* at 21a, 89a, 119a.